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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 227

UNITED MINE WORKERS OF AMERICA, ET AL.,
Petitioners,

versus

ARKANSAS OAK FLOORING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF FOR RESPONDENTS IN OPPOSITION.

GROVE STAFFORD,
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QUESTIONS PRESENTED FOR REVIEW.

The picketing enjoined by the state court in this case was by a union which admittedly has refused to comply with the Labor Management Relations Act by t king the non-communist oath and furnishing financial data required by the Act.

1. Is recognition picketing by such a union an "unfair labor practice" such as would give the Na-

tional Labor Relations Board exclusive jurisdiction and preclude state court action?

2. Is such picketing by a non-complying union an activity protected by the Act?

By stating, in their presentation of questions for review, that the picketing enjoined was that of "a majority designated union representative", petitioners beg one of the basic questions involved in the case. It was precisely for the reason that the petitioning union had made it impossible for the National Labor Relations Board to determine the validity of its *claim* to majority designation that the injunction against picketing was issued.

Petitioner also seeks to present a question involving alleged infringements upon the guaranties of the First and Fourteenth Amendments. It is submitted that no serious question is thus presented. The Court has made itself clear that the Constitution does not preclude a state from enforcing by a ban on picketing, a public policy, whether declared in its statutes or in the opinion of its highest court, such as Louisiana has enforced in this case. *Giboney v. Empire Storage and Ice Company*, 336 U. S. 490, 93 L. Ed. 834, 69 S. Ct. 684; *Hughes v. Superior Court*, 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718; *International Brotherhood v. Hanke*, 339 U. S. 470, 94 L. Ed. 995; *Building Service Employees International Union v. Gazzam*, 339 U. S. 532, 94 L. Ed. 1045. If there is a question presented worthy of review it is one of preemption by the National Labor Relations Act, as amended. *Garner v. Teamsters Union*, 346 U. S. 485, 98 L. Ed. 228; *Weber v. Anheuser-Busch, Inc.*, 75 S. Ct. 480.

ARGUMENT.

THE PETITION SHOULD BE DENIED BECAUSE (a) PRIMARY PICKETING BY A UNION FOR RECOGNITION IS NOT MADE AN UNFAIR LABOR PRACTICE; and (b) PICKETING BY A NON-COMPLYING UNION FOR EXCLUSIVE RECOGNITION IS NOT PROTECTED BY THE ACT.

Unless there has been Federal preemption the decision of the Louisiana Supreme Court should stand. It is submitted that applicable decisions of the Court control this question, and there is no reason for the granting of the writ.

There can be no Federal preemption, in this case, unless the conduct found violative of Louisiana law was made an unfair labor practice by the National Labor Relations Act, as amended, or the activity was protected by that Act. *Weber v. Anheuser-Busch, Inc., supra.*

As to the object and purpose of the picketing the Supreme Court of Louisiana made this finding:

> "* * *. In the instant case the picketing was engaged in for the sole purpose of compelling the employer to recognize as the legally constituted agent of its employees a union that has no legal status before the National Labor Relations Board because of its failure and refusal to comply with the provisions of the Act requiring the filing of certain information relative to structural and financial matters, as well as non-communist oaths. This is clearly not an act denounced as an unfair-labor

practice by the amendment of 1947." (Petitioners' Appendix A, p. 25).

There was only one employer and one union involved and the picketing was admittedly primary picketing for recognition (Pet. p. 6). It must be emphasized that there was neither allegation nor finding that the union's purpose in picketing was to coerce the employer into compelling or influencing its employees to join the union. Cf. *Garner v. Teamsters Union, supra.*

A. PRIMARY PICKETING BY A UNION FOR RECOGNITION IS NOT MADE AN UNFAIR LABOR PRACTICE.

All of the unfair labor practices which may be committed by a union are enumerated in the sub-sections of Section 8 (b) (158 U. S. C. (b)) of the National Labor Relations Act. The conduct made the subject of the petition herein was not a restraint or coercion of an employer in the selection of the person to do his negotiating for him (Section 8 (b) (1) (B)), an attempt to cause or the causation of discrimination (Section 8 (b) (2)), a union refusal to bargain (Section 8 (b) (3)), a secondary boycott (Sections 8 (b) (4) (A) and (B)) a strike against a pending Board certification (Section 8 (b) (4) (C)), a jurisdictional dispute (Section 8 (b) (4) (D)), the imposition of excessive dues or initiation fees (Section 8 (b) (5)), or featherbedding (Sections 8 (b) (6)). The only sub-section of Section 8 (b) which would possibly be construed as applying to a recognition strike by a non-complying union, where no other union is certified as the bargaining representative is Section 8 (b) (1) (A) which makes it: "an unfair labor practice for a labor organiza-

tion or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 . . ."

The National Labor Relations Board, charged with administration of the Act, made it abundantly clear, without the disapproval of a reviewing Court, that it does not construe Section 8 (b) (1) (A) to apply to a recognition strike. In deciding a case based upon a charge filed within two months after the effective date of the Taft-Hartley amendments the Board arrived at a construction of Section 8 (b) (1) from which it has not since deviated, which would preclude consideration of a charge, the gravamen of which was a recognition strike by a non-complying union. In the matter of Perry Norvell Company, 80 N. L. R. B. 225, 239 (1948), it was stated:

> "Assuming, arguendo, the validity of the premises upon which the General Counsel has based his argument, the conclusion does not follow that the strike violated the act. Section 8 (b) (1) (A) was not intended to have the broad and almost limitless reach which the General Counsel urges upon the Board. The legislative history of the Act shows that, by this particular section, Congress primarily intended to proscribe the coercive conduct which sometimes accompanies a strike, but not the strike itself. By Section 8 (b) (1) (A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal. In that Section, Congress was aiming at means, not at ends."

Congress in enacting the Taft-Hartley Amendments did not intend that the picketing herein be made an unfair labor practice, for "the primary strike for recognition (without a Board certification) is not proscribed". S. Rep. No. 105, 80th Cong. 1st Sess. (Pt. 1) 22. Cf. *National Labor Relations Board v. International Rice Milling Co.*, 341 U. S. 665, 95 L. Ed. 1277.

The former General Counsel of the National Labor Relations Board, the statutory officer (U. S. C. 153 (d)) who determines, independently of the Board, whether charges warrant the issuance of a complaint under the Act stated, in an addre before the Arkansas Bar Association on May 13, 1954, that the Act does not prohibit the type of recognition strike which we here have:

> "Another, interesting and difficult question arises in connection with organizational or recognition strikes in circumstances where the union is not the clear representative of the majority of the employees. Thus, for example, assume that two unions are vying for recognition as the exclusive bargaining representative of a given group of production and maintenance employees. Both conduct vigorous campaigns to win majority support among the employees; each has substantial support among the employees as evidenced by the signatures of employees to union cards; indeed, there are overlapping cards, some employees signing cards for one union one day and for other union the next day.

In this not unusual situation the Board has held the employe is duty bound to withhold recognition from either union until the employees have made a choice in an election conducted by the Board. Suppose, however, that one of the two unions strikes for immediate recognition. It has been held that such a strike is not a protected activity; it is designed to compel the employer to grant what it is his duty to withhold and thus to implicate him in a wrong. Hoover Co. v. N. L. R. B., 191 F. (2d) 380 (6th Cir. 1951), N. L. R. B. v. Electronics Equipment Co., 194 F. (2d) 650 (2nd Cir. 1952). But neither, as I see it, is the strike prohibited by the National Labor Relations Act as an unfair labor practice. Bogalusa Motors, Inc., Case No. 15-CB-117, Administrative Appeal denied Feb. 19, 1954. *Congress has seen fit to make only one form of direct recognition strike unlawful as an unfair labor practice, namely, a strike for recognition by one union in the face of the Board's certification of another union as the exclusive bargaining representative.* And this is not an area, in my view, in which as administrators we are free to innovate. Many proposals have been advanced in Congress to prohibit other forms of recognition strikes; much discussion pro and con has taken place, but Congress has not yet seen fit to act. We cannot rush in, it seems to me, where Congress has been so conspicuously reluctant to tread." (Emphasis supplied). 34 Lab. Rel. Rep. 67 (1954).

B. PICKETING BY A NON-COMPLYING UNION FOR EXCLUSIVE RECOGNITION IS NOT PROTECTED BY THE ACT.

The petitioning union is a labor organization which, as a matter of policy, has purposely refused to have its officers file non-communist affidavits, and purposely refused to give proof of financial disclosures to its members, as required by the Act. This is no case of an inadvertent or temporary failure to comply. To the contrary the petitioning union, in requesting a writ of review, openly and avowedly seeks the Court's approval for the continuation of what it calls its "self-help" method of organization. To put it another way, the petitioning union desires to be free to compel recognition by the coercive effect of the picket line, rather than to have recognition awarded to it after orderly election processes in accordance with law.

The National Labor Relations Act, as amended, affords protection to unions engaged in peaceful strikes and picketing for recognition, but only to those unions which make themselves amenable to its processes (Section 9 (f) (g) and (h)). Thus, the petitioning union has made it impossible for the National Labor Relations Board either to certify it as a majority representative of its employees, or to order an employer to bargain with it either with or without certification. Petitioner has no remedy with the Board, the body charged with affording to unions the Act's protection. By adhering to a policy of non-compliance the petitioning union has waived any right to the Act's protection.

The State Supreme Court in this case held that this non-complying union cannot compel the employer to recognize it as the bargaining agent of the employees. This holding is not contrary to existing jurisprudence. Petitioners have cited cases holding that there is no impediment under the act to voluntary recognition, without the union involved being formally certified through Labor Board election procedure, and that an employer may not hide behind insistence upon Labor Board certification as a reason for refusal to bargain while destroying the unions majority by the commission of unfair labor practices. With these cases, none involving non-complying unions, *National Labor Relations Board v. Kobritz*, 193 F. (2d) 8 (14) 1st Cir. (1951); *Iob v. Los Angeles Brewing Co.*, 183 F. (2d) 398, 404; and *N. L. R. B. v. Clearfield Cheese Co.*, 213 F. (2d) 70, 3rd Cir. (1954), we do not disagree.

However, where an employer refuses to recognize or bargain with a union and cites non-compliance as his reason for refusal, the Labor Board will not force recognition or bargaining. This is true even though the union may actually represent a majority of the employees. Matter of *New Jersey Carpet Mills*, 92 N. L. R. B. 604 (1950).

The holding in *N. L. R. B. v. Reed & Prince Mfg. Co.*, 205 F. (2d) 131, 1st Cir. (1953) that a union momentarily out of compliance at the time of the request to bargain, may later achieve compliance and compel bargaining through the Board's processes is inapplicable.

Equally inapplicable are *N. L. R. B. v. Pecheur Lozenge Co.*, 209 F. (2d) 393, 2nd Cir. 1953); *N. L. R. B. v. Tennessee Egg Co.*, 201 F. (2d) 370 6th Cir. (1953).

The union here involved, as its petition discloses, is irrevocably committed to a policy of non-compliance, and complains principally that the decision below amounts "to a death sentence" (Petition, page 17). In short, petitioning union seeks the protection of the Act, but is unwilling to comply with its provisions. If this be a "death sentence", then it certainly is self-inflicted, and could be avoided simply by compliance with law.

The court's reasoning in *N. L. R. B. v. Dant & Russell*, 344 U. S. 374, 382, 73 S. Ct. 335, 97 L. Ed. 407, 413 (1953) disposes of the petitioning union's contention in this regard, adversely to it, beyond need for further exposition. In that decision, which should control here, the Court said:

> "Respondent urges that the above construction of §9 (h) weakens the over-all purpose of the section in that it allows the Board to provide non-complying labor organizations with substantial benefits by the filing of the charge without any assurance of compliance.
>
> "Phrased differently, the argument is that the benefits of the Act may not flow to a labor organization unless the non-Communist affidavits are on file. We agree with the argument, and believe that it is in accord with our interpretation of §9 (h). Since the remedial processes of the Act to cure practices forbidden by §8 (a) (3) can only be in-

> voked by the issuance of a complaint, we do not see how a non-complying labor organization can be said to benefit from the fact that it need not be in compliance at the date of the filing of the charge. The filing of a charge, which is subject to dismissal within 10 days under the Board's rule, unless reasonable assurance is given by the filing union that it will comply with the affidavit requirement, is of no benefit to the charging union unless it is followed by the issuance of a complaint."

What the Court said in the *Dant & Russell* case with regard to charges involving violations of Section 8 (a) (3) (individual discrimination) applies all the more forcibly to charges involving violations of Section 8 (a) (5) (refusal to bargain with a union). It is the petitioning union which petitioners assert to be within the protection of the Act, despite its policy of non-compliance. The holding of the Louisiana Supreme Court that the petitioning union could not compel bargaining is certainly consistent with the Court's interpretation in *Dant and Russell* "that the benefits of the Act may not flow to a labor organization unless the non-Communist affidavits are on file."

To say that a union which, as a matter of policy, refuses to comply with the Act's filing provisions, is unprotected by its remedial provisions is not to say that individual employees lose the protection afforded them by the Act. Any individual may be assured of the Act's protection by filing charges with the Board in his individual capacity. *N. L. R. B. v. Southern Furniture Mfg. Co.*, 194 F. (2d) 59, 5th Cir. (1952); *N. L. R. B. v. Augusta Chemical Company*, 187 F. (2d) 63, 5th Cir. (1951);

N. L. R. B. v. Clausen, 188 F. (2d) 439, 3rd Cir. (1951). But the caution exercised by the Courts and the Board in denying relief under the Act where the proceedings, though purportedly filed on an individual basis, were actually filed by an individual fronting for a non-complying labor organization, demonstrates how untenable is petitioners' position that the Act affords the petitioning union any protection, and that the employer here could be compelled to bargain. *N. L. R. B. v. Happ Bros., Inc.*, 196 F. (2d) 195, 5th Cir. (1952); *N. L. R. B. v. Alside*, 192 F. (2d) 678, 6th Cir. (1951); *White v. Douds*, 80 F. Supp. 402 D. C. S. D. NY. (1948); *Timm Industries, Inc.*, 104 N. L. R. B. 359 (1953); *Woods Parts, Inc.*, 101 N. L. R. B. 445 (1952).

If a state has not the right to protect its employer citizens from the irreparable injury caused by a recognition picket line thrown up by a union which refuses to permit lawful and orderly determination of the question of representation, then the employer is placed in a hopeless dilemma. Under ordinary circumstances, *i. e.*, when confronted by a recognition demand and bargaining request by a union either in compliance with the Act or willing to make itself amenable to Board processes, an employer may demand that the union seek certification under 29 U. S. C. 159 (c), or himself seek an election under that Section. So long as the employer's demand for an election is not made for the purpose of seeking delay in order to undermine the union his right to an election is held by the Board, with Court approval, to be absolute.

Even should it later develop that the union at the time it made its request was, in fact, the majority representative on the basis of signed cards there will be no finding of refusal to bargain where there is no demonstration of bad faith in seeking an election. *Beaver Machine and Tool Co., Inc.*, 97 N. L. R. B. 33 (1951); *Walmac Co.*, 106 N. L. R. B. 1355 (1953); *New Jersey Carpet Mills*, supra; *National Labor Relations Board v. James Thompson and Co., Inc.*, 208 F. (2d) 743, 2nd Cir. (1953).

Thus a complying union can be forced to an election. *Matter of Herman Loewenstein, Inc.*, 75 N. L. R. B. 377. The petitioning union here, a non-complying union, seeks to be placed in a better position than a complying union. Surely Congress did not intend such a situation.

CONCLUSION.

For the foregoing reasons we respectfully submit that the petition for writ of certiorari be denied.

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CERTIFICATE.

I certify that I, a member of the bar of this Court, this day deposited in a United States mail box, air mail, first class postage, prepaid, copies of the above and foregoing brief in opposition addressed as follows:

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